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Supreme Court of the United States

OCTOBER TERM
1949.

No.

LINWOOD L. BRADSHAW, OWNER AND MASTER OF THE MOTOR VESSEL "NETTIE B. GREENWELL", WHO SUES ON BEHALF OF HIMSELF AND THE SURVIVING CREW OF SAID VESSEL AND AS OWNER OF THE CARGO LADEN THEREON, PETITIONER,

versus

STEAMER "VIRGINIA", ITS ENGINES, BOILERS, BOATS, TACKLE, APPAREL AND FURNITURE AND APPURTENANCES, *IN REM*, AND CHESAPEAKE AND OHIO RAILWAY COMPANY, A CORPORTION, OWNER, *IN PERSONAM*, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Linwood L. Bradshaw, owner and master of the Motor Vessel "NETTIE B. GREENWELL", who

sues on behalf of himself and the surviving crew of said vessel and as owner of the cargo laden thereon, respectfully shows unto the Court as follows:

A. SUMMARY STATEMENT OF MATTERS INVOLVED.

This petition arises from adverse decisions of the District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit affirming the opinion of the District Court, dismissing a libel filed by petitioner against the steamer "VIRGINIA" and its owner, Chesapeake and Ohio Railway Company, to recover damages resulting from the sinking of petitioner's vessel, the "GREENWELL", by the "VIRGINIA".

The "GREENWELL" was a vessel of the burden of 41 gross tons, 28 net tons, *72 feet long and 19.3 feet beam,* 5.3 feet deep and was owned and operated by petitioner as an oyster boat. Her hull was painted gray and her pilothouse was painted white. The "VIRGINIA" is a twin screw, steel hull, passenger and freight vessel of the burden of 426 gross tons, 260 net tons, 191 feet long, 32 feet beam, 12 feet deep and at the time of the collision here involved was operated by the Chesapeake and Ohio Railway Company for the transportation of passengers and freight between Norfolk and Newport News, Virginia. Her pilothouse is about forty feet abaft her stem (R. 147). At the time of the collision which occurred about 7:30 P. M., March 11, 1947, the "GREENWELL" was bound down the James River for Hampton, Virginia, and the "VIRGINIA" was bound up the James River along the Newport News waterfront destined for C. and O Pier #1 to discharge passengers. The District Court fixed the location of the collision as being in the vicinity of depth figure 49 shown on Coast and Geodetic Survey Chart 400 as approximately 400 yards southwest of C. and O. Pier 15. Chart 400 is included among the original exhibits composing the transcript of record certified to this Court and marked Libellant's Exhibit 10. A photostatic copy of Chart 400 is in-

serted for the convenience of the Court in the appendix to the brief supporting this petition. At the time of the collision the weather was good. There was no moon, but the stars were out. A light haze or frost on the water somewhat obscured the shoreline, although lights could be seen at a normal distance. Neither the tide nor the wind had any appreciable effect on the movements of the vessels (R. 147). Prior to the collision the "GREENWELL" experienced difficulty with her lighting equipment, and immediately prior to and at the time of the collision, the only light she was showing was a single white light furnished by a white lantern on her stern abaft her pilothouse. The "VIRGINIA" was making 14 knots and the "GREENWELL" six knots.

One lookout was stationed behind a windbreak in the stem of the "VIRGINIA". He was knocked overboard and drowned when in the collision the "GREENWELL'S" mast fell across the "VIRGINIA'S" bow. The lookout made no report whatsoever of the "GREENWELL" at any time (R. 153). Captain Williams, the master of a C. and O carfloat which was being towed by a tug and at all times immediately prior to the collision was astern of the "VIRGINIA", but proceeding in the same direction as the "VIRGINIA", sighted the "GREENWELL" when she passed C. and O Pier 9, a distance of approximately a nautical mile away. The master of the "VIRGINIA", who was in the pilothouse with the helmsman at the time of the collision testified that he did not observe the "GREENWELL" until almost the moment of impact at which time he instantly ordered hard right rudder and placed the engine autotelegraph at full speed astern. These orders were immediately carried out, but had not time to take effect before the collision occurred. The "VIRGINIA" struck the "GREENWELL" on the latter's port side at a point about 15 feet abaft her stem at an angle of about 45 degrees, cutting the "GREENWELL" in two and rendering her a total loss (R. 149). Petitioner Bradshaw testified that when the "VIRGINIA" was approximately 500 yards ahead of him he blew a single blast for a port to port pas-

sage; upon receiving no reply from the "VIRGINIA" he repeated the one blast signal and then blew a danger signal and threw his wheel hard right. The Circuit Court concluded that either the one blast signals of the "GREENWELL" were not given or were of insufficient volume to be heard by those aboard the "VIRGINIA". The "VIRGINIA" gave no signals of any kind at any time.

B. HISTORY OF CASE AND JURISDICTION OF THIS COURT.

1. Opinion of the District Court.

The District Court wrote no opinion, but filed findings of fact and conclusions of law which did not incorporate a specific finding as to the adequacy of the lookout aboard the "VIRGINIA", but which concluded that the "VIRGINIA" was being navigated in accordance with the rules of the road and that the action of those in charge of her navigation, upon sighting a dark object ahead was reasonable and proper under the circumstances existing and dismissed the libel of the petitioner and sustained the cross-libel of the Chesapeake and Ohio Railway Company (R. 5).

2. Opinion of the Court of Appeals.

The Court of Appeals affirmed the judgment of the District Court, but in its opinion held (1) "The most serious fault of the 'GREENWELL' and that which we feel was virtually the sole cause of the collision, was, of course, her failure to carry proper lights." (2) The lookout on the "VIRGINIA" "made no report whatsoever of the 'GREENWELL'." (3) That notwithstanding the fact that the lookout on the "VIRGINIA" never reported the "GREENWELL" at any time although the night was clear and the stars were out, the petitioner had the "heavy burden of showing the 'GREENWELL'S' failure to carry proper lights and his own failure to navigate his small unlighted vessel so as to avoid the 'VIRGINIA', were not the

sole causes of the collision", and having not borne this burden the District Court's opinion must be affirmed in whole.

3. JURISDICTION OF THIS COURT.

(1) The date of the judgment herein entered by the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court is August 10, 1949.

(2) This being an appeal from the decision of a federal court of appeals in admiralty, the jurisdiction of this Court is invoked under Title 28, U. S. C. A., Section 1254.

C. QUESTIONS INVOLVED.

(1) On the admitted facts, namely, that the lookout on the "VIRGINIA" failed at all times to report the "GREENWELL", a vessel 19.3 feet wide and 72 feet long, with a white cabin and carrying a lighted lantern on her stern on a clear and starry night although seen by others further away, did the Court of Appeals err as a matter of law in holding that such facts did not constitute failure on the part of the "VIRGINIA'S" lookout?

(2) Did the Court of Appeals commit error under the admitted facts in holding that the burden of showing the lookout on the "VIRGINIA" could see the "GREENWELL" was on the petitioner, contrary to the holding of this Court in the case of *The Ariadne*, 13 Wall. 475, 479, 20 L. Ed. 542, 80 U. S. 475?

D. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

FIRST: The Court of Appeals in its opinion found, among others, the following facts: (a) The "GREENWELL" was a vessel 72 feet long, 19.3 feet wide. Her hull

was painted gray and her pilothouse was painted white. The "GREENWELL" had a mast. (b) At the time of the collision the weather was good. There was no moon and the stars were out. (c) That Captain Williams of the C. and O. carfloat, which was at all times here involved some distance astern of the "VIRGINIA", "* * * saw the 'GREENWELL' 'when she passed Pier 9', which would have been a distance of approximately a nautical mile." (d) The lookout on the "VIRGINIA" at no time reported seeing the "GREENWELL".

The Court of Appeals concluded as a matter of law, that the Court would "be indulging in sheer speculation" were it to hold the "VIRGINIA'S" lookout incompetent under the above admitted facts. The captain and the quartermaster of the "VIRGINIA" who were stationed in the pilothouse forty feet aft of the position where the lookout was stationed, both admitted sighting the "GREENWELL" either as a vessel or a dark object at varying distances and times prior to the collision. The crew members of the tug "CAPE CHARLES" and a C. and C. carfloat which the tug had in tow also admitted seeing the "GREENWELL" at various distances prior to the collision at all of which times the tug and carfloat were at least 100 yards astern of the "VIRGINIA" (R. 45).

Therefore, it is an admitted fact that the master of the "VIRGINIA" sighted the "GREENWELL" some distance ahead of the "VIRGINIA" prior to the collision, but the lookout failed to make any report whatsoever at any time. This constitutes negligence on the part of the "VIRGINIA'S" lookout as a matter of law.

The distance the lookout on the "VIRGINIA" could have sighted the "GREENWELL" as a vessel or object and reported the same is material only with regard to the relevancy of his failure to report the vessel as a contributing cause of the collision. The distance he could have seen the "GREENWELL" does not alter a condemnation of his inefficiency in view of the fact that he never at any time made a report.

In view of the above findings of the Court of Appeals, it is submitted that that Court's conclusion that to hold the "VIRGINIA'S" lookout incompetent under such facts "would be indulging in sheer speculation", is in error and in conflict with this Court's opinion in the case of *The New York*, 175 U. S. 187, 20 S. Ct. 67, 73, holding the New York at fault for failing to maintain an effective lookout. The Court stated at page 73 (20 S. Ct.):

> "Her officers failed conspicuously to see what they ought to have seen or to hear what they ought to have heard. This, unexplained, is conclusive evidence of the defective lookout."

Admittedly, the facts in *The New York, supra,* vary from the facts in the case at bar, but the principle of law is the same. The difference in facts in the two cases merely affects the relevancy of the lookout's failure in the instant case as a contributing cause of the collision and as previously stated, does not alleviate his incompetency.

The holding of the Court of Appeals for the Fourth Circuit in this respect is also in conflict with the holding of the Court of Appeals for the Second Circuit in *The Pavonia*, 26 Fed. 106, affirming the District Court for the Southern District of New York, 23 Fed. 204.

There the lookout on the Pavonia did not see the Weehawken until that vessel was a half a length away from the Pavonia and the Court of Appeals for the Second Circuit held (26 Fed. 110):

> "The fact that she was not seen is all that is necessary to impute negligence to the Pavonia."

SECOND: It is respectfully submitted that the holding of the Court of Appeals for the Fourth Circuit in the instant case is in direct conflict with the holding of this Court in the case of *The Ariadne, supra,* which latter decision reversed the District Court for the Southern District of New York and what is now the Court of Appeals for the Second Circuit. The decision of this Court in *The Ariadne,*

supra, has been the pilot decision for Courts of Admiralty in establishing the importance of all vessels maintaining efficient lookouts and the duty of the courts in resolving any doubt as to a vessel's compliance with the requirement of maintaining an efficient lookout. Any probable conflict between a decision of a lower court and the decision of this Court in *The Ariadne* should be immediately eliminated by a review by this Court of the conflicting lower court decisions.

This court held in *The Ariadne,* which case involved facts substantially identical with the instant case, that (80 U. S. 475 at 479):

> "It is the duty of all Courts charged with the administration of this branch of our jurisprudence to give it (the duty of maintaining an efficient lookout) the fullest effect whenever the circumstances are such as to call for its application. *Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.*" (Parenthesis and italics supplied.)

Contrary to the holding of this Court as cited above, the Court of Appeals for the Fourth Circuit has, in effect, held in the instant case that every doubt as to the performance of the duty of the lookout on the "VIRGINIA" and the effect of his non-performance should be resolved against the "GREENWELL" rather than the "VIRGINIA".

In its opinion the Court of Appeals admitted that there were existing doubts as to the performance of the duty of the "VIRGINIA'S" lookout and the effect of his non-performance of this duty by incorporating the following language in its opinion:

> "* * * there are admittedly conflicts left unresolved" (R. 154).

Nowhere in its opinion, however, did the Court of Appeals acknowledge or accept the duty laid down by this Court in *The Ariadne* to resolve those conflicts against the "VIRGINIA". On the contrary, the Court of Appeals throughout its opinion held that the petitioner in all respects and at all times had the heavy burden of showing that the "GREENWELL" could have been seen by the "VIRGINIA" in time to avoid collision. One instance of the Court of Appeals so holding is indicated by the following language:

> "He, (the petitioner) has not borne the heavy burden of showing that the 'GREENWELL'S' failure to carry proper lights and his own failure to navigate his small unlighted vessel so as to avoid the "VIRGINIA" were not the sole causes of the collision" (R. 151). (Parenthesis supplied.)

The petitioner respectfully submits that if the Court of Appeals had reviewed the testimony in the light of the law of *The Ariadne, supra,* a finding of fault against the "VIRGINIA" for having an inefficient lookout would have been inevitable. The District Court would have been reversed and a divided damage decree would have been directed to be entered.

THIRD: The opinion of the Court of Appeals in the instant case casts serious doubts as to the applicability of the law laid down by this Court in *The Ariadne, supra,* with respect to one of the most vital duties of a vessel, i. e., to maintain an efficient and effective lookout. The decisions of the Court of Appeals for the Fourth Circuit control the Federal District Courts which sit in admiralty in the ports of Baltimore, Maryland, Norfolk and Newport News, Virginia, Wilmington, North Carolina, and Charleston, South Carolina. In view of the accepted necessity for maintaining uniform judicial interpretations of the admiralty law, instant case, in a circuit whose decisions affect a substantial segment of the shipping industry of the nation, this and the conflicting opinion of the Court of Appeals in the

Court should eliminate any probable conflict between the instant decision and the decision of this court in *The Ariadne, supra,* by granting this petition for *certiorari.*

Wherefore, your petitioner respectfully prays that a writ of *certiorari* issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court for review and determination on a date certain to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 5905, Linwood L. Bradshaw, Owner and Master of the Motor Vessel "NETTIE B. GREENWELL", Who Sues on Behalf of Himself and the Surviving Crew of Said Vessel and as Owner of the Cargo Laden Thereon, Appellant, *v.* Steamer "VIRGINIA", Its Engines, Boilers, Boats, Tackle, Apparel, Furniture, and Appurtenances, *In Rem,* and Chesapeake and Ohio Railway Company, a corporation, Owner, *in Personam,* Appellee, and that the decree of the United States Court of Appeals for the Fourth Circuit in this case may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as may be just. And your petitioner will ever pray, etc.

LINWOOD L. BRADSHAW,
By: R. ARTHUR JETT,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purposes of delay.

R. ARTHUR JETT,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM
1949.

No. .....

LINWOOD L. BRADSHAW, OWNER AND MASTER OF THE MOTOR VESSEL "NETTIE B. GREENWELL", WHO SUES ON BEHALF OF HIMSELF AND THE SURVIVING CREW OF SAID VESSEL AND AS OWNER OF THE CARGO LADEN THEREON, PETITIONER,

versus

STEAMER "VIRGINIA", ITS ENGINES, BOILERS, BOATS, TACKLE, APPAREL AND FURNITURE AND APPURTENANCES, *IN REM*, AND CHESAPEAKE AND OHIO RAILWAY COMPANY, A CORPORTION, OWNER, *IN PERSONAM*, RESPONDENTS.

SUPPORTING BRIEF.

I. OPINIONS OF THE COURTS BELOW.

The District Court wrote no opinion. Its findings of fact and conclusions of law (R. 5-10) are not officially re-

ported. The opinion of the Court of Appeals (R. 146-154) has not been reported as of the date of this brief.

II. JURISDICTION.

The date of the judgment of the Court below is August 10, 1949 (R. 155), and the grounds on which jurisdiction is invoked is stated in the petition at page 5.

III. STATEMENT OF THE CASE.

The essential facts stated in the petition commencing at page 2.

IV. SPECIFICATIONS OF ERROR.

The Court of Appeals for the Fourth Circuit erred:

(1) In failing to hold under the admitted facts that the "VIRGINIA'S" lookout was incompetent.

(2) In holding, in effect, that the petitioner herein had the heavy burden of going forward with the evidence and showing that the "VIRGINIA'S" lookout could not have seen the "GREENWELL" in time to avoid the collision.

(3) In holding that the master of the tug "CAPE CHARLES" testified that the "GREENWELL" was not more than 100 yards beyond the "VIRGINIA" when he first sighted her.

(4) In failing to hold that the navigators of the "VIRGINIA" could and should have sighted the "GREENWELL" even assuming it was only a dark object, much sooner than they did and in time to have avoided the collision.

(5) In concluding that had the "VIRGINIA" treated the dark object sighted as a vessel at the very instant of

sighting the same, the "VIRGINIA" could not have avoided a collision with the "GREENWELL".

(6) In affirming the judgment of the District Court.

V. ARGUMENT.

The points of argument are stated in the petition at page 5, under Topic C "Questions Involved".

FIRST POINT:

On the Admitted Facts the Lookout on the "VIRGINIA" Was Inefficient as a Matter of Law and the Court of Appeals Committed Error in Failing to so Hold.

The uncontradicted evidence in this case is that everyone who was a witness to the collision saw the "GREENWELL" at some time prior to the collision, *except* the lookout on the "VIRGINIA", the one person who should have seen and reported the "GREENWELL" before anyone else.

All of the witnesses, as to the time elapsing and the distance between the "GREENWELL" and the "VIRGINIA", after the "GREENWELL" was first sighted, were either employees of the Chesapeake and Ohio Railway Company or of vessels chartered to that company. Quite naturally they were not prone to volunteer testimony helpful to the petitioner.

The Court of Appeals recognized that there was substantial conflict in the testimony of the above witnesses between their testimony given at a Coast Guard investigation the day following the collision and their testimony at the trial in the District Court 22 months subsequent thereto. These witnesses admitted that their recollection of the events was better at the Coast Guard hearing. The following excerpts from the uncontradicted testimony of these witnesses, which the Court of Appeals brushed aside as "conflicts left unresolved", show clearly that the "GREEN-

WELL" could be and was seen in ample time to avoid the collision and convict the "VIRGINIA'S" lookout beyond the shadow of a doubt:

(1) Captain Williams of the C. and O carfloat which at all times was astern of the "VIRGINIA", sighted the mast and boom of the "GREENWELL" opposite C. and O. Pier No. 9 which the Circuit Court held was at least a nautical mile away (R. 153). Captain Williams testified:

> "Q. Captain Williams, will you tell me about where you first observed an object in the water which later turned out to be the GREENWELL? A. Well, when she passed Pier 9 there wasn't no ship on the outshore berth and I seen a mast and a boom coming by, the lights under Pier 9, and then I looked and seen the water from the bow and stern too. * * *" (R. 22).

(2) The Circuit Court found that Captain Hudgins of the tug "CAPE CHARLES" which had in tow the C. and O. carfloat referred to above, testified that the "GREENWELL" was about 100 yards beyond the "VIRGINIA" when he first sighted her. This is clear error. Captain Hudgins testified on this point as follows:

> "Q. Captain, the question is at the time you saw that object which would be about 100 yards from the point where the VIRGINIA passed you, how far was it from that point where you first saw the object to the place where it was in the river between Pier 9 and X? A. You want me to estimate this distance from here to here (indicating)?
>
> (See markings on Chart 400 inserted in appendix to brief.)
>
> Q. Yes. A. Probably 300 yards or more.
>
> By the COURT:
>
> Q. That is 300 yards from your position and the object when you first saw the object? A. Yes.
>
> Q. And you think the VIRGINIA was probably

100 yards nearer the object than you were? A. Yes, sir" (R. 45).

(3) Although at the trial of the case Quartermaster Foster of the Steamer "VIRGINIA", who was stationed in the pilothouse of the "VIRGINIA" at the time of the collision, tried to abbreviate the time elapsing between his sighting the "GREENWELL" and the collision, he had to admit that he had previously testified as follows:

"Q. Captain Foster, as I said, I realize it is difficult to recall what your recollection was two years ago about this accident and right now I am particularly interested in whether that object that you saw ahead before the collision was moving or not and, with that in mind, I wish to read to you your testimony on that point before the Coast Guard. You were asked the question: "Will you state in your own words, the incidents leading up to the collision and immediately following that occurrence with the fishing vessel NETTIE B. GREENWELL", and your answer was, "We was going on up about on northwest half west. Northwest half west was our course and the atmosphere—we had some frost and kind of hazy looking. The water and the atmosphere was about the same color. I saw a little object ahead, dark, no lights. *I said to Captain Wiley that something was coming down there and he looked out and said 'Yes, I don't see no lights.' About two minutes time she was into us or less.* In fact, when I saw the boat the reflection of the bow light showed up against the hull of the boat." (Italics supplied.)

* * * * *

Q. Do you think your recollection and judgment of time on March 13, 1947, was better than it is today? A. Well, yes, I wouldn't have a doubt about it being" (R. 28, 29).

(4) Captain Wiley of the "VIRGINIA" who had the "GREENWELL" called to his attention as a dark object by Quartermaster Foster admitted sighting the "GREENWELL" as an object one-eighth of a mile from his desig-

nation of the point of collision. Captain Wiley testified that he sighted the "GREENWELL" as a dark object one-eighth of a mile from buoys 7 and 8 and that in his opinion the collision occurred one-quarter of a mile from buoys 7 and 8. His testimony in this respect reads as follows:

> "Q. Where did this collision occur? Captain? A. Well, I would say in the vicinity off Pier 15, off the end of Pier 15.
>
> Q. Would you be able to say whether you were to the west of it or the east of it or about opposite? A. I think we were a little to the east of it.
>
> (The District Court held collision occurred 400 yards southwest of Pier 15; Finding of Fact 10, R. 9).
>
> * * * * *
>
> Q. How far do you think you were from buoys nos. 7 and 8? A. Oh, I judge close to a quarter of a mile.
>
> * * * * *
>
> Q. Captain, before the Coast Guard, you told them two things; you told them once that the collision occurred a quarter of a mile, and again you told them an eighth of a mile. According to your recollection today, which is correct? A. Well, as near as I can recollect, I told them I was about an eighth of a mile when I first saw the object in sight. If I told them an eighth of a mile at the point of collision, then I would like to rectify that.
>
> Q. In other words, you want the point of collision to be a quarter of a mile from Buoys 7 and 8? A. That is right, according to my judgment" (R. 65, 66).

By this testimony Captain Wiley is on record as stating that he first sighted the "GREENWELL" as an object when he was one-eighth of a mile from buoy 7. If the Court will take a pair of dividers and extend them one-eighth of a nautical mile or 253 yards from buoy 8 as shown on Chart 400 and then extend the dividers from this desig-

nated point to depth figure 49, a short distance west of pier 15, where the lower Court fixed its point of collision, the Court will ascertain that the distance from the point where Captain Wiley first sighted the "GREENWELL" as an object to said point of collision is 3,040 feet. At an admitted speed of 14 knots it would have taken Captain Wiley two and one-tenths minutes to cover this distance. Accordingly, Captain Wiley corroborates Quartermaster Foster's estimate of at least two minutes as being the period of time elapsing from the sighting of the "GREENWELL" as a dark object ahead and the time of the collision.

Even if we adopt the language of the Circuit Court in characterizing the above testimony as "conflicts left unresolved", we cannot escape the fact that every witness who testified saw the "GREENWELL" some time prior to the collision and the lookout on the "VIRGINIA" never saw the "GREENWELL".

Regardless of the weight given to the above admissions it is submitted that there can be no explanation for a lookout not seeing the "GREENWELL" which was a vessel 72 feet long, 19.3 feet wide, with a pilothouse painted white, carrying a mast and boom on a night when the moon and stars were out and visibility was good. All of the evidence, is to the effect that she could be seen and was seen by witnesses on other vessels at a much greater distance away from the "GREENWELL" than was the "VIRGINIA". On these facts, it is submitted that the Circuit Court's holding in the instant case, that it would be "sheer speculation to hold the 'VIRGINIA'S' lookout incompetent" is in error. This Court has long held that the unexplained failure of a lookout to see an approaching vessel is conclusive evidence of such lookout's negligence. *The New York*, 175 U. S. 187, 20 S. Ct. 67, 73. In holding the New York at fault for a defective lookout, this Court stated:

> "Her officers failed conspicuously to see what they ought to have seen, or to hear what they ought

to have heard. This, unexplained, is conclusive evidence of the defective lookout."

The above stated principle of law has been applied in the Second Circuit in *The Pavonia,* 26 Fed. 106, affirming the District Court for the Southern District of New York, 23 Fed. 204. There the lookout on the steamer Pavonia did not see the steamer Weehawken until that vessel was a half a length away from the Pavonia. The Court of Appeals for the Second Circuit held, 26 Fed. 110:

"The fact that she was not seen is all that is necessary to impute negligence to the Pavonia."

The facts in the cited case differ from the facts in the instant case, but the principle of law laid down is applicable to any case where there is an unexplained failure of a lookout to see a vessel as soon as he should have seen it. Even assuming the "GREENWELL" had no lights due to an unexpected failure of the "GREENWELL'S" batteries, the undisputed testimony as shown above, is to the effect that the "GREENWELL" could and was seen at varying distances prior to the collision and the unexplained failure of the "VIRGINIA'S" lookout to report the "GREENWELL" at any time makes controlling the principle of law laid down in *The New York, supra,* and *The Pavonia, supra.*

It is submitted that the failure of the Court of Appeals for the Fourth Circuit to apply the law of this Court and the Second Circuit in the above respect is sufficient cause to warrant this Court to review the lower court's decision in this case.

SECOND POINT:

Holding of the Court of Appeals in Instant Case is in Direct Conflict With the Holding of This Court in the Case of the Ariadne.

It is seldom that the facts in two different cases are on all fours, but if ever such be true, it is the case of *The*

Ariadne, 13 Wall. 475, 20 L. Ed. 542, 80 U. S. 475, and the instant case.

In *The Ariadne, supra*, this Court was concerned with the failure of the lookout aboard the Ariadne to see an unlighted brig in time to avoid collision. The District Court for the Southern District of New York (1 Fed. Cas. 1,110) and the Circuit Court which is now the Court of Appeals for the Second Circuit, affirming the District Court (1 Fed. Cas. 1,112) had held the brig solely at fault for failing to carry lights. The District Court held:

> "In any view, *the burden is on the libellant* to show that the steamer was at fault. But, as the brig did not have a green, light burning, it is especially upon them to show, notwithstanding such condition of their own lights, the collision arose from the fault of the steamer. The libellant failed to show this." (Italics supplied.)

The Circuit Court held:

> "Now in such case, the libellant cannot recover unless they show fault in the steamer, so concurring with their own so as to warrant a claim to contribution. Indeed, the only ground for recovery, even if the brig was free from fault, would be either that the steamer might and ought to have sooner seen the brig, or that, when she did see the brig, she did or omitted something which she ought not to have done or omitted. *On this point the burden of proof is upon the libellant.*" (Italics supplied.)

It is respectfully requested that this Court analyze the District Court and Circuit Court opinions in *The Ariadne*, and to facilitate the Court's task in this respect these opinions are printed as a part of the appendix to this brief at pages 27, 28, 29, 30.

A careful reading is requested in view of the fact that the Court of Appeals in the instant case followed the *erroneous reasoning of the lower courts in The Ariadne*. The Court of Appeals in the instant case (R. 151) stated:

> "*He (petitioner) has not borne the heavy burden* of showing that the "GREENWELL'S" failure to

carry proper lights and his own failure to navigate his small unlighted vessel so as to avoid the VIRGINIA were not the sole causes of the collision." (Italics and Parenthesis supplied.)

This Court, in *The Ariadne, supra,* reversed the two lower courts for imposing upon the libellant the burden imposed upon this petitioner by the Fourth Circuit and in so doing made the following statement of law regarding the duty of a vessel to maintain a proper lookout (80 U. S. 478):

> "The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel, with all the property and the lives of all on board. The same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilence. The rigor of the requirement rises according to the power and speed of the vessel in question. It is applied with full force to the steamships belonging to our commercial marine. If this were not so, there would be no safety for other vessels. But it is equally important to vessels of that powerful class for their protection from one another. *It is a duty of all Courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty and the effect of non-performance should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.*" (Italics supplied.)

It is respectfully submitted that the Court of Appeals for the Fourth Circuit on facts substantially identical to the facts prevailing in *The Ariadne,* has reached conflicting conclusions of law with that of this Court. In support of our argument in this connection there is set out herewith a table of comparison of the facts and law in *The Ariadne, supra,* and the instant case:

TABLE OF COMPARISON.

Facts.

"GREENWELL"	"ARIADNE" (80 U. S. 475)
1. One light on stern of "GREENWELL" (R. 6).	1. Brig had no light (80 U. S. 476).
2. Steamer "VIRGINIA" 191 feet long (R. 5).	2. Steamer "ARIADNE" 200 feet long (80 U. S. 477).
3. Steamer "VIRGINIA" highly maneuverable (R. 152); could change course 5¾ degrees within 100 feet (R. 19).	3. Steamer "ARIADNE" highly maneuverable (80 U. S. 477).
4. Steamer "VIRGINIA" could be completely stopped when going full speed in 45 seconds (R. 64).	4. Steamer "ARIADNE" could be stopped in two lengths (80 U. S. 477).
5. "VIRGINIA" had but one lookout (R. 9).	5. "ARIADNE" had but one lookout (80 U. S. 477).
6. Quartermaster on "VIRGINIA" saw "GREENWELL" first. Neither he nor captain inquired of lookout (R. 61).	6. Second mate sighted brig first. Inquired of lookout (80 U. S. 477).
7. Lookout on "VIRGINIA" *never* reported "GREENWELL" (CCA opinion, R. 153).	7. Lookout sighted unlighted brig when pointed out by second mate (80 U. S. 478).
8. No action taken by "VIRGINIA" until instant of collision (CCA opinion, R. 149).	8. No action taken by "ARIADNE" until too late to avoid collision (80 U. S. 476).
9. Visibility good, lighted object could be seen distance of six miles (R. 32).	9. Visibility good, but some clouds; lighted object could be seen only two miles (District Court opinion see appendix).

10. "GREENWELL" seen by: (a) Captain of C. & O. carfloat astern of "VIRGINIA" saw "GREENWELL" at least a mile away by C. & O. Pier 9 (CCA opinion, R. 153). (b) Captain of tug "CAPE CHARLES" saw "GREENWELL" 900 feet or 1/6 mile away (R. 45). (c) Quartermaster of "VIRGINIA" saw "GREENWELL" as dark object two minutes prior to collision (R. 29). (d) Captain of "VIRGINIA" saw "GREENWELL" 1/8 mile from his designation of point of collision (R. 66). (e) Lookout on "VIRGINIA" never saw or never reported "GREENWELL" (CCA opinion, R. 153).	10. Brig "WILLIAM EDWARDS" without lights could be seen one-eighth mile away was not seen until one boat length away (80 U. S. 477).

Conclusions of Law.

Circuit Court affirmed District Court and held: (a) That burden on "GREENWELL" to show "VIRGINIA'S" lookout	Circuit Court affirmed District Court and held: (a) That unlighted brig solely at fault and further that burden was on brig to

could have seen "GREENWELL", following lower Court's opinions in The Ariadne, which had been reversed by this Court.

(b) That "VIRGINIA" without fault.

(c) Supreme Court—?

show that lack of lights did not contribute to collision.

(b) That steamer "ARIADNE" without fault.

(c) Supreme Court reversed District and Circuit Courts and held burden of showing lookout could not have seen unlighted brig on steamer "ARIADNE"—held "ARIADNE" at fault —divided damages.

The distances the witnesses to the instant collision saw the "GREENWELL" prior to collision has been set out in detail under the first point of this brief. The negative action of Captain Wiley and Quartermaster Foster of the "VIRGINIA", after sighting the "GREENWELL" ahead is vividly emphasized by their testimony as follows:

Quartermaster Foster.

"Q. Captain (Quartermaster) Foster, will you tell us if you ever heard anything from the lookout, any warning or any sound from the lookout prior to the collision? A. No, sir.

* * * * *

Q. Captain (Quartermaster) Foster, when this collision occurred and this boat loomed up in front of you, didn't you wonder what had happened to your lookout if he wasn't asleep or something? A. Well, yes, I reckon so, but everything happened so quick you didn't have time to think" (R. 30, 31).

* * * * *

Q. Did you make any remark to the captain or did the captain make any remark to you when you first

observed this dark object? A. I told the captain I guess it must be coal dust. He said well, he thought it was too.

Q. And what did you do? A. Didn't do anything —kept going.

Q. What is that? A. Didn't do anything, just kept right on going (R., 32).

* * * * *

Q. When the Coast Guard asked you what your conversation was you said, "I said to Captain Wiley that something was coming down there and he looked out and said, 'Yes, I don't see no light'." You all wouldn't be expecting to see lights on coal dust, would you? A. I don't reckon I would" (R. 34).

* * * * *

Q. You all decided, since it had no lights on, you could go on as you were and you assumed it was something on the water other than a boat? Is that a correct statement? A. Yes, sir, that is correct.

Q. Did your boat ever give any whistles prior to that collision? A. No, sir (R.,34).

* * * * *

Q. Captain (Quartermaster) Foster, do you recall whether or not you all reversed your engines, actually got them in reverse, before the collision? A. I don't know whether they had time to respond to the telegraph or not. I hardly think we did. About the time they responded she was into the boat.

Q. Did your boat make any change in course from the time you saw the dark object ahead, about two minutes before the accident, until the time of the collision? A. No, we never changed our course" (R. 31).

Captain Wiley.

"Q. Do you remember Quartermaster Foster's telling you that there was an object up ahead, a dark object? A. I said that while ago, yes, sir.

Q. Did it run through your mind at that time where in the world the lookout was? A. Yes. I was looking out and I could see him right in line with the object that I saw.

Q. You could? A. Yes, sir.

Q. You didn't change your vision, I suppose, prior to the accident did you? A. Oh, well, it is just a question of raising up and seeing what is in your vision.

Q. Didn't you yell down to him, 'What is that ahead'? A. No, sir.

Q. You did not? A. No, sir" (R. 61).

It is uncontradicted that even though the master and quartermaster of the "VIRGINIA" knew there was an object ahead which their lookout was not reporting they did not inquire of him as to its identity, signal, slow down or change course.

The "VIRGINIA" could have stopped in 45 seconds or changed her course 5¾ degrees in 100 feet. She did nothing.

The Court of Appeals dismissed this evidence as "unresolved conflicts" and resolved all conflicts against the petitioner.

As referred to above, this Court in *The Ariadne, supra,* held that "Every doubt as to the performance of the duty (i. e., maintain an efficient lookout) and the effect of the non-performance should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary." (Parenthesis supplied.)

In view of the above conflict of the Court of Appeals for the Fourth Circuit with regard to so universally important a decision of the admiralty law as enunciated by this Court in *The Ariadne, supra,* this Court by reviewing the decision of the lower courts in the instant case should remove all shadow of doubt concerning the applicability of its decision in *The Ariadne* and reaffirm the law regarding the duty of all vessels to maintain effective and efficient lookouts.

VI. CONCLUSION.

As the lookout on the "VIRGINIA" was inefficient the "VIRGINIA" had the burden of showing that the "GREENWELL" could not be seen in time to avoid the collision. On the admitted facts, it is evident that the "VIRGINIA" did not do all that she could do to avoid the collision and these doubts must be resolved against the "VIRGINIA". Therefore, the decision below should be reversed and petitioner awarded an interlocutory decree, dividing damages between his vessel and the "VIRGINIA".

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX

LOWER COURT HISTORY OF "THE ARIADNE".

DISTRICT COURT.

"The Ariadne", 1 Fed. Cas. 1,110, Case No. 524 (D. C. S. D. N. Y., 1868).

OPINION.

BLATCHFORD, D. J.: "I think the weight of evidence is, that the brig did not have burning, at the time of the collision, such a green starboard light as the statute requires—a light capable of being seen on a dark light with a clear atmosphere, at a distance of at least two miles. The night was dark, but not foggy, though cloudy, and the evidence is that the light of a vessel could have been seen that night two miles. No green light on the brig could be seen from the steamer, and the evidence from on board the brig, that her green light was burning at the time, so as to be visible, beyond a very short distance, is very unsatisfactory. There had been trouble with both of the side lights of the brig that night, and they had required to be taken down and re-trimmed. If the green light had been properly burning, it would have been seen from the steamer, at a sufficient distance to have left the brig solely blameless and the steamer wholly in fault, for the collision. This fault on the part of the brig, undoubtedly led to the collision.

"In any view, the burden is on the libellant to show that the steamer was in fault. But, as the brig did not have a green light properly burning, it is especially incumbent on them to show, that, notwithstanding such condition of their own lights, the collision arose from the fault of the steamer. The libellants failed to show this. They do not show that the steamer could, with proper vigilance, have seen the brig in season to avoid her. The speed of the

steamer was not too great, in view of the character of the night, there being no fog, and she having a right to rely on the exhibition of a light by an approaching vessel, for the reason that a proper light, if exhibited, could be seen at a distance sufficiently great to avoid a collision. The steamer had a lookout properly stationed, competent and attentive, and it is not made out that the brig could have been seen sooner than she was. She loomed up out of the darkness, but, because her green light could not be seen, her course could not be discerned, and the evidence is, that the steamer was promptly slowed and stopped and backed, and that when the master of the steamer, by the aid of his night glass, made out the course of the brig, the helm of the steamer was put to starboard, which turned her head to the eastward, and was the proper maneuver, as the brig was headed to the westward. The libel must be dismissed with costs."

CIRCUIT COURT.

"*The Ariadne,* 1 Fed. Cas. 1,112, Case No. 525 (C. C. S. D. N. Y., 1870).

OPINION.

WOODRUFF, C. J.: "After a careful study of the evidence in this case, aided by the able argument of the counsel for the libellant and his full written brief, I cannot resist the conclusion that the misfortune which befell the vessel of the libellant, was due to the fact that, at the time of the approach of the "Ariadne", the starboard or green light of the brig was out, or so nearly so that it could not be seen from the steamer. There is, undoubtedly, much conflict in the testimony, but the evidence on the part of the libellant, though it be taken to establish that the light was trimmed and bright twenty minutes or half an hour before the collision, is not inconsistent with the assumption that, either by smoke or other imperfection, it had become nearly invisible within that time, while there is much evidence in the testimony of the libellants' own witnesses which warrants that assumption. They had had much trouble with the lights, the binnacle light, fed by the same oil, required frequent attention to prevent its going out. The side lights required trimming once, twice and even three times, during a single watch; and when the starboard light was last brought from the cabin and put up, it was flaring. When to this added the uniform testimony of every man who testified in behalf of the claimant, that no light could be seen from the steamer, it is clear that, in this respect the libellants stand with a good preponderance of the testimony against them. And this is so without imputing willful falsehood to their witnesses, no one of whom I think professes to have inspected the green light after it was put up, twenty minutes or half an hour before the collision.

"Now, in such cases, the libellants cannot recover, unless they show fault in the steamer, so concurring with their own as to warrant a claim to contribution. Indeed

the only ground for recovery, even if the brig was free from fault, would be either that the steamer might and ought to have sooner seen the brig, or that, when she did see the brig, she did or omitted something which she ought not to have done or omitted. On this point the burden of proof is upon the libellant.

"It is true, that in circumstances of apparent danger, where there is reason to apprehend collision, instant and extraordinary diligence is the duty of a steamer seeing and approaching a sailing vessel so as to avoid her, if possible. But vessels have right to assume that other vessels, if in their neighborhood, ar acting in obedience to the statute regulations, and where the negligence of the sailing vessel and her failure to comply with the statute requiring her to bear a light which can be seen at a distance of two miles, has lead the steamer into danger of collision, it is not for the sailing vessel to insist, that by more than usual vigilence, she might, nevertheless, have been discovered at a few yards greater distance, and to claim contribution on that ground. In this case, I think there is a failure to show that the brig could have been seen from the steamer sooner than she was. Certainly, the proof does not show it so clearly as to warrant a decree declaring the steamer in fault.

"When the brig was discovered, I do not perceive that anything was omitted which could have tended to save the brig. The steamer's helm was hove a-starboard, and her engine was stopped and reversed. The propriety of these maneuvers cannot be questioned. There were done immediately and the manner of the blow shows that they were very nearly effectual to cause the steamer to pass astern of the brig.

"Without discussing the very prolific testimony of the various witnesses, it must suffice to add that, upon a most painstaking consideration of the case, I think the conclusions of the District Court were correct, and that the libellant has failed to put the steamer in fault.

"The decree must be affirmed, with costs."